

ORIGINAL

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C/m

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DR. GERALD FINKEL, as Chairman of the
Joint Industry Board of the Electrical Industry,

Plaintiff,

MEMORANDUM AND ORDER

Case No. 06-CV-2169 (FB) (RLM)

-against-

EAST END ELECTRICAL ASSOCIATES, LTD.,

Defendant.
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Appearances:

For the Plaintiffs:

EYAD ASAD, ESQ.
Cohen, Weiss and Simon, LLP
330 West 42nd Street, 25th Floor
New York, NY 10036

BLOCK, Senior District Judge:

Plaintiff Gerald Finkel, as Chairman of the Joint Industry Board of the Electrical Industry (the "Joint Board"), commenced this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132, 1145, and section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, against defendant East End Electrical Associates, Ltd. ("East End"), to recover delinquent benefits contributions and other payments allegedly owed to the Joint Board. Although East End was properly served with copies of the summons and complaint, it failed to appear or otherwise defend against the action and plaintiff moved for a default judgment. The Court subsequently entered a default judgment in favor of plaintiff and referred the

matter to the assigned magistrate judge for an inquest on damages. See Docket Entry No. 14 (Mem. and Order dated Jan. 4, 2007).

On July 10, 2007, Magistrate Judge Roanne L. Mann issued a Report and Recommendation (“R & R”) recommending that judgment be entered against East End for unpaid contributions to ERISA and non-ERISA plans, interest on those unpaid contributions, interest on late-paid contributions, liquidated damages, attorney’s fees and costs. See R & R at 20-21. Plaintiff timely filed objections to the R & R, challenging Magistrate Judge Mann’s denial of contributions allegedly due for (1) the week ending May 26, 2004, (2) the Electrical Employers Self-Insurance Plan (“EESISP”), (3) Local Union No. 3 (“Local 3”) dues assessments, and (4) the Committee for Political Education (“COPE”), see Docket Entry No. 30 (Objection dated July 24, 2007); in further support of these damages claims, plaintiff filed two additional declarations, see Docket Entry Nos. 31 (Decl. of Eyad Asad dated July 24, 2007 (“Asad Third Decl.”)), 32 (Decl. of Christina A. Sessa dated July 24, 2007 (“Sessa Third Decl.”)).

The Court therefore considers this new evidence and reviews the challenged portions of the R & R *de novo*. See 28 U.S.C. § 636(b)(1) (providing that court “shall make a de novo determination of those portions of the report . . . to which objection is made” and “may also receive further evidence”); *United States v. Tortora*, 30 F.3d 334, 337 (2d Cir. 1994) (quoting statute). Since a defendant’s default “is not considered an admission of damages,” *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992), the Court “must instead conduct an inquiry in order to ascertain the amount of damages

with reasonable certainty,” *Credit Lyonnais Securities (USA), Inc. v. Alcantara*, 183 F.3d 151, 155 (2d Cir. 1999).

A. Contributions for Week Ending May 26, 2004

Plaintiff alleges that East End owes \$5,000 in unpaid contributions for the week ending May 26, 2004. In support, plaintiff submits (1) East End’s electronic payroll report listing a total of \$7,056.10 due in contributions for that week, *see* Supplemental Decl. of Christina A. Sessa dated May 14, 2007 (“Sessa Second Decl.”), Ex. B; (2) a declaration of plaintiff’s associate counsel that East End made a partial payment in the amount of \$2,056.10, *see, e.g.*, Decl. of Christina A. Sessa dated Jan. 24, 2007 (“Sessa First Decl.”) ¶ 32; and (3) a handwritten record made by the Joint Board noting that East End paid the remaining \$5,000.00 by check, which was subsequently dishonored by its bank, *see* Sessa Second Decl. ¶¶ 9-11 & Ex. D (Joint Board record); Sessa First Decl., Ex. J (dishonored check). Thus, plaintiff has demonstrated that it is entitled to \$5,000.00 in unpaid contributions for this period.

In recommending that this specific request be denied, Magistrate Judge Mann suggested that the dishonored check’s memo line – in which East End noted “WK#21 PAID IN FULL; WK 22 PARTIAL PMNT” – “raises the possibility that a damages award based on the check would be duplicative if the Court also awarded the damages plaintiff requests for the [following] week.” R & R at 8-9. While this concern is valid, it is not determinative since plaintiff has submitted other evidence demonstrating that East End still owes \$5,000.00 in contributions for that week, and the dishonored check merely reflects a failed payment of that amount.

Having granted plaintiff's request for damages, the Court also awards prejudgment interest on that amount. *See* 29 U.S.C. § 1132(g)(2) (providing for award of prejudgment interest on unpaid contributions to ERISA plans); *Lodges 743 & 1746, Int'l Ass'n of Machinists v. United Aircraft Corp.*, 534 F.2d 422, 446 (2d Cir. 1975) (holding that award of prejudgment interest in LMRA cases is in "the sound discretion of the district courts"). Because the unpaid contributions are governed by different interest rates, the Court adopts, as plaintiff's recommended interest rate of 4.5 percent, "the lowest interest rate applicable under the plans for the week ending in May 26, 2004." Supplemental Decl. of Eyad Asad dated Jan. 24, 2007 ("Asad Second Decl.") ¶30.

B. EESISP and COPE Contributions and Local 3 Dues

Plaintiff alleges that East End owes \$3,527.11 in unpaid contributions to EESISP, \$5.08 in unpaid contributions to COPE, and \$554.63 in Local 3 dues. In support, it initially submitted (1) East End's electronic payroll reports of the total amounts it calculated were owed to the Joint Board for the period of weeks ending June 2 through August 11, 2004, *see* Sessa First Decl., Ex. G; (2) spreadsheets prepared by the Joint Board showing additional amounts due for two of East End's employees for the weeks ending July 17 and August 15, 2003, *see* Sessa Second Decl., Ex. F; and (3) East End's individual employee payroll reports for the period of weeks ending June 2 through August 11, 2004, showing that one East End employee elected to contribute to COPE during that period, *see id.*, Ex. A.¹ Magistrate Judge Mann recommended denying these requests, stating that

¹Plaintiff mistakenly assigned error to Magistrate Judge Mann's calculation of the amounts requested for EESISP contributions; it is plaintiff, however, that erred in

“plaintiff point[ed] to no provision setting forth the method by which contributions [were] to be calculated” for EESISIP and that “the record contains no other mention of East End’s obligation to make [] contributions” to COPE and Local 3 dues. R & R at 18.

In response to the R & R, plaintiff submitted to the Court (1) a Joint Board document dated June 28, 2002, setting forth the relevant EESISIP contribution rates, and (2) a Joint Board letter dated March 13, 1997, advising employers of the dues assessment rate. See Sessa Third Decl. ¶¶ 3-4 & Exs. A, B. With respect to the alleged unpaid contributions to COPE, plaintiff states that “[t]here is no set percentage for [COPE] contributions; instead, employees determine how they wish to contribute,” Sessa Third Decl. ¶ 5, and redirects the Court’s attention to East End’s payroll reports showing that one employee elected to contribute to COPE, *see id.* (citing Sessa Second Decl., Ex. A).

These records support plaintiff’s damages calculations; accordingly, plaintiff has proven the amount owed to EESISIP, COPE and Local 3 and is entitled to delinquent contributions in the amounts requested. In the exercise of its discretion, *see Lodges 743 & 746*, 534 F.2d at 446, the Court also awards prejudgment interest on these amounts at the rates suggested by plaintiff.

C. Awards

As no error appears on the face of the unchallenged portions of the R & R, the Court adopts those portions without *de novo* review, *see Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 174 (2d Cir. 2000) (holding that “[f]ailure to timely

totaling the contribution amounts listed in its supporting documentation. See Pl.’s Objection to R & R at 7 & n.5

object to a report generally waives any further judicial review of the findings contained in the report,” but that court may still conduct *de novo* review if “magistrate judge committed plain error”), and makes the following awards:

1. ERISA Plans

<u>Fund</u> ²	<u>Week Ending</u>	<u>Principal Amount</u>	<u>Prejudgment Interest due as of January 24, 2007</u> ³	<u>Per Diem Interest (to be multiplied by number of days between January 24, 2007, and Entry of Judgment)</u>
PHBF	7/17/03	\$101.88	\$17.96	\$0.01
	8/15/03	\$135.84	\$23.41	\$0.02
	6/02/04	\$1,869.31	\$222.63	\$0.23
	6/9/04	\$2,722.91	\$321.94	\$0.34
	6/16/04	\$2,777.26	\$325.97	\$0.34
	6/23/04	\$2,336.64	\$272.23	\$0.29
	6/30/04	\$1,775.84	\$205.36	\$0.22
	7/07/04	\$694.31	\$84.12	\$0.09
	7/14/04	\$747.72	\$89.91	\$0.10
	7/21/04	\$841.19	\$100.38	\$0.11

²The Court adopts plaintiff’s abbreviations of the ERISA and non-ERISA fund names.

³The Court has verified that plaintiff’s calculations of prejudgment interest as of January 24, 2007 are reasonable, *see* Assad Second Decl., Ex. D, and adopts them with the following exceptions: (1) interest on unpaid contributions to DBF are calculated at the statutory rate prescribed by 26 U.S.C. § 6621, *see* R & R at 12 & n.12; and (2) interest on unpaid contributions to NEBF are calculated “from the end of each month,” rather than on a weekly basis, *id.* at 13; *see also* Assad Third Decl., Ex. A (recalculation of interest on NEBF contributions).

	7/28/04	\$1,039.06	\$123.05	\$0.14
	8/04/04	\$747.72	\$87.87	\$0.10
	8/11/04	\$1,495.45	\$174.37	\$0.19
	<u>SUBTOTAL</u>	\$17,285.05	\$2,049.20	\$2.18
DBF	7/17/03	\$11.22	\$1.98	\$0.00
	8/15/03	\$14.96	\$2.58	\$0.00
	6/02/04	\$119.95	\$15.87	\$0.02
	6/9/04	\$175.28	\$23.02	\$0.02
	6/16/04	\$178.21	\$23.24	\$0.02
	6/23/04	\$149.94	\$19.41	\$0.02
	6/30/04	\$113.95	\$14.64	\$0.02
	7/07/04	\$44.55	\$4.56	\$0.00
	7/14/04	\$47.98	\$4.86	\$0.01
	7/21/04	\$53.98	\$5.42	\$0.01
	7/28/04	\$67.22	\$6.70	\$0.01
	8/04/04	\$47.98	\$4.75	\$0.01
	8/11/04	\$95.96	\$9.42	\$0.01
	<u>SUBTOTAL</u>	\$1,121.18	\$136.51	\$0.15
AF	7/17/03	\$63.00	\$11.11	\$0.01
	8/15/03	\$84.00	\$14.47	\$0.01
	6/02/04	\$980.00	\$129.68	\$0.13
	6/9/04	\$1,372.00	\$180.24	\$0.19
	6/16/04	\$1,456.00	\$189.88	\$0.17
	6/23/04	\$1,225.00	\$158.58	\$0.13

	6/30/04	\$931.00	\$119.63	\$0.05
	7/07/04	\$364.00	\$37.14	\$0.04
	7/14/04	\$392.00	\$39.69	\$0.05
	7/21/04	\$441.00	\$44.32	\$0.05
	7/28/04	\$490.00	\$48.87	\$0.04
	8/04/04	\$392.00	\$38.79	\$0.09
	8/11/04	\$784.00	\$76.98	\$0.09
	<u>SUBTOTAL</u>	\$8,974.00	\$1,089.38	\$1.05
ASBP	7/17/03	\$86.62	\$15.27	\$0.01
	8/15/03	\$115.50	\$19.90	\$0.02
	6/02/04	\$1,155.41	\$152.89	\$0.16
	6/9/04	\$1,733.32	\$227.71	\$0.24
	6/16/04	\$1,792.11	\$233.71	\$0.20
	6/23/04	\$1,444.28	\$186.97	\$0.15
	6/30/04	\$1,097.65	\$141.04	\$0.06
	7/07/04	\$445.23	\$45.43	\$0.05
	7/14/04	\$462.15	\$46.80	\$0.06
	7/21/04	\$519.95	\$52.25	\$0.07
	7/28/04	\$647.46	\$64.57	\$0.05
	8/04/04	\$462.18	\$45.74	\$0.10
	8/11/04	\$924.33	\$90.76	\$0.10
	<u>SUBTOTAL</u>	\$10,886.19	\$1,323.04	\$1.27
E&C	7/17/03	\$3.69	\$0.65	\$0.00
	8/15/03	\$4.92	\$0.85	\$0.00

	6/02/04	\$11.96	\$1.56	\$0.00
	6/9/04	\$17.18	\$2.26	\$0.00
	6/16/04	\$17.47	\$2.28	\$0.00
	6/23/04	\$14.70	\$1.90	\$0.00
	6/30/04	\$11.17	\$1.44	\$0.00
	7/07/04	\$4.37	\$0.45	\$0.00
	7/14/04	\$4.70	\$0.48	\$0.00
	7/21/04	\$5.29	\$0.53	\$0.00
	7/28/04	\$6.59	\$0.66	\$0.00
	8/04/04	\$4.70	\$0.47	\$0.00
	8/11/04	\$9.41	\$0.92	\$0.00
	<u>SUBTOTAL</u>	\$115.95	\$14.45	\$0.00
401(k)	7/14/04	\$321.91	\$32.60	\$0.04
	7/21/04	\$351.31	\$35.30	\$0.04
	7/28/04	\$430.93	\$42.97	\$0.05
	8/04/04	\$161.70	\$16.00	\$0.02
	8/11/04	\$687.92	\$67.55	\$0.08
	<u>SUBTOTAL</u>	\$1,953.77	\$194.42	\$0.23
NEBF	7/17/03	\$16.61	\$2.93	\$0.00
	8/15/03	\$22.14	\$3.82	\$0.00
	6/02/04	\$176.40	\$45.33	\$0.05
	6/9/04	\$275.40	\$70.77	\$0.08
	6/16/04	\$291.69	\$74.96	\$0.08
	6/23/04	\$220.50	\$56.67	\$0.06

6/30/04	\$167.58	\$43.07	\$0.05
7/07/04	\$71.82	\$17.85	\$0.02
7/14/04	\$70.56	\$17.53	\$0.02
7/21/04	\$79.38	\$19.73	\$0.02
7/28/04	\$98.85	\$24.56	\$0.03
8/04/04	\$70.56	\$16.93	\$0.02
8/11/04	\$141.12	\$33.87	\$0.04
<u>SUBTOTAL</u>	\$1,702.61	\$428.02	\$0.47
 <u>TOTAL</u>	 \$42,038.75	 \$5,235.02	 \$5.35

2. Non-ERISA Plans

<u>Fund</u>	<u>Week Ending</u>	<u>Principal Amount</u>	<u>Prejudgment Interest due as of January 24, 2007</u>	<u>Per Diem Interest (to be multiplied by number of days between January 24, 2007, and Entry of Judgment)</u>
EESISP	7/17/03	\$34.15	\$6.10	\$0.00
	8/15/03	\$46.12	\$7.95	\$0.01
	6/02/04	\$367.50	\$43.77	\$0.05
	6/9/04	\$573.75	\$67.84	\$0.07
	6/16/04	\$607.69	\$71.32	\$0.07
	6/23/04	\$459.38	\$53.52	\$0.04
	6/30/04	\$349.13	\$40.37	\$0.02
	7/07/04	\$149.63	\$18.13	\$0.02
	7/14/04	\$147.00	\$17.68	\$0.02
	7/21/04	\$165.00	\$19.74	\$0.03

	7/28/04	\$205.94	\$24.39	\$0.02
	8/04/04	\$147.00	\$17.27	\$0.04
	8/11/04	\$294.00	\$34.28	\$0.04
	<u>SUBTOTAL</u>	\$3,546.67	\$422.36	\$0.43
Local 3	6/02/04	\$58.80	\$7.00	\$0.01
	6/9/04	\$91.81	\$10.85	\$0.01
	6/16/04	\$97.23	\$11.41	\$0.01
	6/23/04	\$73.50	\$8.56	\$0.01
	6/30/04	\$55.86	\$6.46	\$0.00
	7/07/04	\$23.94	\$2.90	\$0.00
	7/14/04	\$23.52	\$2.83	\$0.00
	7/21/04	\$26.46	\$3.16	\$0.00
	7/28/04	\$32.95	\$3.90	\$0.00
	8/04/04	\$23.52	\$2.76	\$0.01
	8/11/04	\$47.04	\$5.48	\$0.01
	<u>SUBTOTAL</u>	\$554.63	\$65.31	\$0.06
JIB	7/17/03	\$3.69	\$0.65	\$0.00
	8/15/03	\$4.92	\$0.85	\$0.00
	6/02/04	\$60.74	\$7.23	\$0.01
	6/9/04	\$88.76	\$10.49	\$0.01
	6/16/04	\$90.24	\$10.59	\$0.01
	6/23/04	\$75.93	\$8.85	\$0.01
	6/30/04	\$57.70	\$6.67	\$0.00
	7/07/04	\$22.56	\$2.73	\$0.00

	7/14/04	\$24.30	\$2.92	\$0.00
	7/21/04	\$27.33	\$3.26	\$0.00
	7/28/04	\$34.04	\$4.03	\$0.00
	8/04/04	\$24.30	\$2.86	\$0.01
	8/11/04	\$48.59	\$5.67	\$0.01
	<u>SUBTOTAL</u>	\$563.10	\$66.80	\$0.06
BDF	6/02/04	\$29.40	\$3.50	\$0.00
	6/9/04	\$45.90	\$5.43	\$0.01
	6/16/04	\$43.68	\$5.13	\$0.01
	6/23/04	\$36.75	\$4.28	\$0.00
	6/30/04	\$27.93	\$3.23	\$0.00
	7/07/04	\$10.92	\$1.32	\$0.00
	7/14/04	\$11.76	\$1.41	\$0.00
	7/21/04	\$13.23	\$1.58	\$0.00
	7/28/04	\$16.47	\$1.95	\$0.00
	8/04/04	\$11.76	\$1.38	\$0.00
	8/11/04	\$23.52	\$2.74	\$0.00
	<u>SUBTOTAL</u>	\$271.32	\$31.95	\$0.02
COPE	6/02/04	\$0.56	\$0.07	\$0.00
	6/9/04	\$0.82	\$0.10	\$0.00
	6/16/04	\$0.90	\$0.11	\$0.00
	6/23/04	\$0.70	\$0.08	\$0.00
	6/30/04	\$0.70	\$0.08	\$0.00
	7/07/04	\$0.28	\$0.03	\$0.00

7/14/04	\$0.42	\$0.05	\$0.00
7/21/04	\$0.28	\$0.03	\$0.00
7/28/04	\$0.00	\$0.00	\$0.00
8/04/04	\$0.00	\$0.00	\$0.00
8/11/04	\$0.42	\$0.05	\$0.00
<u>SUBTOTAL</u>	\$5.08	\$0.60	\$0.00
 <u>TOTAL</u>	 \$4,940.80	 \$587.02	 \$0.57

3. Week Ending May 26, 2004

	<u>Week Ending</u>	<u>Principal Amount</u>	<u>Prejudgment Interest due as of January 24, 2007</u>	<u>Per Diem Interest (to be multiplied by number of days between January 24, 2007, and Entry of Judgment)</u>
Combined Funds	5/26/04	\$5,000.00	\$599.79	\$0.07

4. Liquidated Damages

Plaintiff is awarded liquidated damages “in an amount equal to the total amount of interest due on the unpaid ERISA contributions,” R & R at 14: that is, \$5,235.02 through January 24, 2007, plus an additional \$5.35 per diem from that date until entry of judgment. *See supra* Part C.1.

Since plaintiff has not provided any evidence regarding which portion of the unpaid contributions for the week ending May 26, 2004, are attributable to ERISA plans, the Court excludes interest on that amount from its calculation of liquidated damages.

5. Attorneys Fees and Costs

Plaintiff is awarded \$2, 292.50 in attorney's fees and \$661.64 in costs.

D. Summary of Awards

The Clerk of the Court shall enter judgment against defendant in the following amounts:

Total unpaid contributions	\$51,979.55
Total prejudgment interest as of January 24, 2007	\$6,421.83
Additional prejudgment interest	\$5.99 multiplied by number of days between January 24, 2007 and entry of judgment
Liquidated damages	\$5, 235.02 plus \$5.35 multiplied by number of days between January 24, 2007 and entry of judgment
Attorney's fees	\$2,292.50
Costs	\$661.64

SO ORDERED.

/signed/

FREDERIC BLOCK
Senior United States District Judge

Brooklyn, New York
August 29, 2007